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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

JOHN SALVADOR, JR. and KATHLEEN A. SALVADOR,

Petitioners,

v.

THE LAKE GEORGE PARK COMMISSION; *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Do the provisions of the Americans with Disabilities Act ("ADA") apply to State and State actors preventing such entities and persons from intentionally interfering with the provision of handicap access by private, non-governmental entities?

2. Do the decisions of the District Court and the Second Circuit Court of Appeals distort and improperly extend the holding of this Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356, 121 S. Ct. 955, __ L.Ed. 2d___ (2001)?

3. Does sovereign immunity or qualified immunity protect state officials and contractors from intentional conduct, which must be *ultra vires* in nature, preventing or interfering with citizen compliance with the ADA and violation the provisions of the ADA prohibiting such interference?

4. Does the First Amendment protect individuals from interference with the exercise of citizens seeking governmental redress through court proceedings?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioners: John Salvador, Jr. ("John Salvador"), an individual, and Kathleen A. Salvador ("Kathleen Salvador"), an individual, collectively referred to as "the Salvadors".

Respondents[1]: The Lake George Park Commission ("Commission"). Petitioners state that the Commission is a governmental body and part of the New York State Department of Environmental Conservation ("DEC"). Carl R. DeSantis, Sr. ("DeSantis"). Petitioners state that DeSantis is an individual and is or was the Chairman of and Member of the Commission. H. Gordon Burleigh ("Burleigh"). Petitioners state that Burleigh is an individual and is or was the Vice-Chairman of and Member of the Commission. Margaret Stewart ("Stewart"). Petitioners state that Stewart is an individual and is or was the Secretary/Treasurer of and Member of the Commission. Bruce E. Young ("Young"). Petitioners state that Young is an individual and is or was Member of the Commission. Thomas L. Wood ("Wood"). Petitioners state that Wood is an individual and is or was a Member of the Commission. Joan A. Robertson ("Robertson"). Petitioners state that Robertson is an individual and is or was the a Member of the Commission. E. Wilson Campbell ("Campbell"). Petitioners state that Campbell is an individual and is or was a Member of the Commission. James B. Neal ("Neal"). Petitioners state that Neal is an individual and is or was a Member of the Commis-

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[1] As noted by the District Court at page 2 of its Decision and Order, the following were the only remaining defendants in the litigation, plaintiffs having voluntarily stipulated out the other initially named defendants. The Second Circuit decision at footnote 1 at page 2 thereof; however, did not note this fact.

sion. Anthony P. Reale ("Reale"). Petitioners state that Reale is an individual and is or was a Member of the Commission. John P. Cahill ("Cahill"). Petitioners state that Cahill is an individual and is or was the Commissioner of DEC and Ex-officio Member of the Commission. Sandra LeBarron, ("LeBarron"). Petitioners state that LeBarron is an individual and is or was the official Designee of the Commissioner of DEC to the Commission, and is or was the Special Assistant to the Commissioner of the DEC for the Adirondacks. Michael P. White ("White"). Petitioners state that White is an individual and is or was the Executive Director of the Commission. Molly Gallagher ("Gallagher"). Petitioners state that Gallagher is an individual and is or was an Environmental Analyst for the Commission. Martin Auffredou ("Auffredou"). Petitioners state that Auffredou is an individual and an attorney and is or was Counsel to the Commission, described by Respondents as a private contractor or provider of contract services. The New York State Department of Environmental Conservation ("DEC"). Petitioners state that the DEC is a governmental entity within the Executive Department of the State of New York, and the "parent" entity under which the Commission exists. (With the exception of Respondent Auffredou, all other identified Respondents are collectively referred to as "State Respondents").

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PETITION

John Salvador, Jr. and Kathleen A. Salvador, Petitioners, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

This is a dispute over a validly vested property right in a non-revocable Class A Marina Permit ("Marina Permit") issued to Petitioners by Respondent DEC and later attempted to be first limited and then revoked by the Commission, the successor arm of the DEC designated to handle matters involving the Lake George park area. Other similarly issued Marina Permits were treated by the Commission as property rights which run with the land. It involves the refusal of the Commission to allow use of a Handicapped and Emergency Access facility ("Handicap Access") installed after all required permits had been obtained by Petitioners to comply with Handicap Access to recreational facilities for Petitioners' guests, members of their Dunham's Bay Boat and Beach Club ("Boat Club") and for use by emergency service providers for rescues and practice. Petitioners sought to provide proper handicap access, but are prohibited by the Commission from allowing the handicapped to use that access, leaving only access across Petitioners' sandy beach.

The dispute also involves issues of intentional targeting of Petitioners for desperate treatment and denial of equal protection and due process for the exercise of their First Amendment rights, among others. The governing legislation is New York State Environmental Conservation Law, Article 43, under which the Commission operates.

This action was commenced in Federal District Court, Northern District of New York with Complaint dated and filed

December 23, 1998. (Hon. Frederick Scullin, Jr.) Petitioners herein had attempted to remove to the District Court an enforcement action brought by the Commission against Petitioners and their corporation, in New York State Supreme Court shortly after Appellants commenced this action. A *pro se* defendant named in that action failed to consent resulting in remand. Issue was joined with service of an Answer by Respondents dated February 5, 1999. While before the District Court, between May 1999 and March 2000, the parties engaged in settlement negotiations relating to both actions which failed. Respondents moved for judgment on the pleadings which was granted by District Court March 28, 2001, filed March 29, 2001.

The Salvadors appealed to the Second Circuit Court of Appeals for the Second Circuit ("Second Circuit"). (Notice of Appeal April 26, 2001). Petitioners filed one (1) brief with the Second Circuit in support and thereafter were served with two briefs one on behalf of all Respondents except Auffredou; the second served was on behalf of Respondent Auffredou. Petitioners timely filed one (1) response addressing that filed by all Respondents excluding Auffredou, and a second responding to that filed by Auffredou. By letter dated January 24, 2002, the Second Circuit notified Petitioners that they were they were "Not allowed to file two separate sets of briefs". [Copy set forth in Appendix]. Petitioners sought to locate the authority for such limitation in either the Federal Rules of Civil Procedure (FRCP) or the Second Circuit's Local Rules and located none. The closest reference found is Local Rule 28, Briefs (c) Reply Brief, which does not appear to set forth such limit and (i) Briefs in a Case Involving Multiple Appellants or Appellees, which also fails to set forth such limitation. Petitioners sought "appeal" unsuccessfully from this determination and were left with allowance of only one(1) such response, resulting in submission of only the Petitioners' brief responding to the brief of all Respondents other than Auffredou. The Second Circuit's disallowance of Petitioners'

Brief addressing Auffredou's arguments led to that Court's determination that Petitioners' arguments were raised "only obliquely" in the allowed Reply Brief (Decision, footnote 2) and other references. The Second Circuit affirmed the decision of the Court below by decision dated April 26, 2002. Petitioners sought panel rehearing and a rehearing en banc. Both petitions were denied by Order dated and filed June 3, 2002.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of New York is found in 28 U.S.C. §§ 1331, 1343. This action charges violations of Petitioners' Constitutional rights by Respondents under the First, Fourth, Fifth and Fourteenth Amendment of the United States Constitution and for damages and fees under 42 U.S.C.§§ 198 3, 1988. 42 U.S.C. §§ 12201 *et seq.* and 12203(a) and (b)*et seq.*

Subject matter jurisdiction for the Second Circuit Court of Appeals was invoked through 28 U.S.C. §1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

United States Constitution Article III
Amendments I, IV, V, XI, XIV
15 U.S.C. §§ 1, 2 *et seq.*
42 U.S.C. § 1983 *et seq.*
42 U.S.C. § 1988
Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*
42 U.S.C. § 12202; 42 U.S.C. § 12203
42 U.S.C. § 12181 *et seq.*
New York State Administrative Procedure Act (SAPA)
SAPA §§ 100, *et seq.* § 202 *et seq.*, § 204 *et seq.*
28 C.F.R. Part 36
28 C.F.R. Parts 35 and 37

STATEMENT OF THE CASE

A. General Background and Description

The Salvadors purchased property located on Lake George, New York, during the 1970s, including an operating marina situated on their property extending beneath the flood waters of Lake George and abutting its waters. In the 1980s, the DEC enacted regulatory provisions impacting operation of marinas on Lake George with which the Salvadors duly and timely complied. The DEC issued the Salvadors a Permit to operate a marina on Lake George. [See Lodging, L-1] The DEC permit did not have a term or expiration date. The Salvadors operated under and by virtue of the DEC Permit continuously, without any break in time or type of service offered and continue to do so to date. Prior to the issuance of the Salvadors' Marina permit by the DEC, in 1961 the Commission was established within the DEC. As part of the DEC the Commission had actual and constructive knowledge of the DEC Permit issued to the Salvadors. In 1996 the Commission told the Salvadors that they were required to apply for an "Update/Renewal" of their existing DEC permit, purportedly based on regulations adopted in 1988, after the issuance of the Salvadors' preexisting DEC Permit which established the base measure of the Salvadors' property rights with respect to such permits. The Salvadors complied with the Commission's application request and had numerous meetings with representatives of the Commission attempting equitable resolution of the permit issue. Those attempts ceased when the Commission refused to recognize the validity of the Salvadors' preexisting DEC Marina Permit. The Commission informed the Salvadors that it unilaterally was reducing the scope and number of uses allowed to the Salvadors if the Commission decided to grant any Marina Permit to the Salvadors. Initially during the "Updating" process, the Commission and its staff contended that in no other case involving operation of a marina on Lake George did it recognize the existence of a pre-existing DEC permit and claimed the Salvadors were afforded the same treatment as

given to all other applicants before the Commission. That was untrue. Three (3) types of permits were available to commercial uses on Lake George: the original continuing DEC Permits; Class A Marina Permits; and Class B Marina Permits. During ongoing attempts to resolve disputed issues, the Salvadors received another application form from White.[See Lodging, L-2] That form on its face included the category of "Update / Renewal" of an existing DEC Permit. The lower courts denied the Salvadors discovery and they therefore cannot determine the precise number of applications of this type accepted by the Commission. It was a classification selection denied the Salvadors by the Commission. The Commission's prejudicial and discriminatory actions with respect to the Salvadors went so far that Auffredou stated on public record that the Commission should require the Salvadors be named individually on any permit issued by the Commission so their personal assets could be reached, beyond the assets of the actual applicant corporation when, not if, the Commission moved against the Salvadors in an enforcement action. One member of the Commission noted other similarly situated corporate applicants, even one considered at the same meeting, were not compelled to comply with that requirement. There can be no equivocating interpretation of the unambiguous statement on the record by Auffredou. The clear facial meaning of the publically stated words are part of the Commissions' public records.

During 1999 the Salvadors obtained necessary approvals for construction of a Handicap Access at their marina. This facility was approved by the Town of Queensbury, and its Planning Board. The Salvadors went through the prescribed regulatory process and obtained the permits and approvals including County Planning Board, Army Corps of Engineers, APA, and DEC, which specifically authorized the work to proceed. The Commission was placed on notice by the Town of the process but failed to participate. After the Town issued permits, neighboring property owners commenced litigation

attempting to have the permits rescinded. The Salvadors and the Town were named in that action in State Supreme Court. The Salvadors sought to join the Commission as a necessary party. The State Court denied that motion to join, but determined the permits had been properly granted by the Town and specifically held that the Handicap Access was not an expansion of the Salvadors' marina facility. [Copy of Decision Set Forth in Appendix]. Not until the facility was substantially completed did the Commission seek and obtain the TRO in May 2000, prohibiting completion and use. The TRO remains in effect with no hearing having been held to take testimony and no evidence received. The Commission failed to cooperate with discovery requests in that matter and requests for judicial action remain unanswered.

B. Procedural Background and Issues

This action is premised on discriminatory enforcement, application and handling of administrative and regulatory matters by the Commission relating to the Salvadors. The Commission's handling of the Salvadors' "application" for a Class A Marina Permit was discriminatory, different from the way other similar applications were handled by Commission. The Commission's failure to acknowledge or accept the scope of the Salvadors' preexisting DEC Marina Permit as "grandfathering" the scope and extent of the Salvadors' marina operations is in conflict with applicable laws, rules and regulations and in direct contradiction in the handling of other similar Marina Permit applications by the Commission.

The Salvador are prohibited by the Commission from completing and operating a Handicap Access constructed by the Salvadors solely for the use of the members of their Boat

Club (and at the time overnight guests[2] of their Lodge), and local emergency, fire, ambulance and rescue services which used the unimproved sandy beach area for rescues and practice. In May 2000, the Commission obtained the TRO preventing the Salvadors from competing and operating the Handicap Access. The Salvadors attempted to oppose this in State court and sought judicial subpoenas for State witnesses for hearing on the TRO; the Commission moved to quash. No decision has been made on the subpoenas; no hearing held on the underlying TRO. The Salvadors have no legal recourse which is aggravated by shifting of the State case from judge to judge, most recently in mid-2001.

The record contains numerous specific instances where the Commission and Auffredou acted in a manner known by them to intentionally violate the Salvadors' Constitutionally guaranteed rights. Those actions are deliberate and intentional: Despite lack of discovery, the Salvadors met their burden to defeat the motion below. The Salvadors note that the decisions below, particularly the Second Circuit's, without stating a basis or reason, addressed only the content of the amended complaint [See Appendix] ignoring the content of affidavits submitted by and on behalf of the Salvadors and accompanying exhibits, which establish the validity of the Salvadors' claims, and are part of the Record.

C. Respondents' Actions were Motivated by Personal Animus, due in part to the Salvadors' Prior Pro Se Actions and exercise of First Amendment Rights.

The Commission argues that the Handicap Access is a "boat ramp" and as such is "prohibited" by the Commission

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[2] The Salvadors sold the Lodge, closing in March 2001, but retained the Marina and other property. At all relevant times, the Salvadors owned and operated the Lodge. The term "guests" or similar, used herein relates to the time the Salvadors owned and operated the Lodge.

regardless of its nature as an access facility for the members of the Boat Club. The Commission allows its documented animus against the Salvadors to spill over into its decision making process, causing harm not only to the Salvadors, the intended targets, but extending to harm handicapped persons who otherwise would be able to enjoy the State owned Lake, and persons whose employment was made more difficult due to the inability to use this facility intended to accommodate handicapping conditions. The Salvadors acted in good faith in the capacity of owners of a facility which has handicapped members who experienced difficulty in achieving full enjoyment of both the facilities and Lake George. For years, with the Salvadors' consent, local fire and rescue operations had access to the Lake in emergency situations on the Salvadors' property. The facility at issue was and is to be offered by the Salvadors to such emergency services along with a dry hydrant they installed to facilitate use in emergency circumstances. The Salvadors have had handicapped persons in their employ, this facility would improve use and access to the Lake for handicapped employees. The improvement of the area to include the Handicap Access, however, was not initiated as a result of any employment litigation pending or threatened, just knowledge of the expansion of the ADA to include recreation facilities and an intent to bring the facilities into compliance. The improvement at issue has been judicially determined by State Supreme Court decision which was not appealed, [See Appendix] not to be an expansion of any use, nor a new use as the Commission argued. The Salvadors had not anticipated that attempting to comply with the ADA and provide better access for their handicapped members and employees would be opposed by anyone. Since their neighbors who brought the State Court action are competitors in the marina business, that challenge had the cover of a business issue. The challenge by the Commission not only is unfounded and based on bias, but also violates the rights and protections afforded the identified class of handicapped persons intended to benefit by its

installation. The Commission's attack on the Salvadors spills over into violation by the Commission of the ADA. The Commission is the wrongdoer casting a shroud intentionally obstructing use and enjoyment of Lake George by members of the public who suffer from handicapping conditions, further restricting the access to the lake from those the Commission members apparently view as the "unwashed masses".

The Salvadors do not provide services to any persons other than their guests, members, rescue workers and employees. In *Lake George Park Commission* v. *Salvador*, State Supreme Court, Index No. 37573, the Commission, argued in support of their application for the TRO prohibiting completion and use of the Handicap Access. The Commission avered at some possible, unspecified future date the Handicap Access conceivably could be opened to anyone, making Lake George more accessible for use by handicapped members of the general public, "MR. RAPPOPORT[3]: ... [T]he Commission has the authority to seek injunctive relief in Court. It need not establish irreparable harm, but, . . . as we explain . . ., the likelihood of such ***harm could result if the use of the ramp were open to the members of the public.***" [Emphasis added]. The Commission argued, "MR. RAPPOPORT: . . . - has had to be determined by the Commission, because the Commission was going forward on the records before of ***a lack of confirmation that the rules of membership would never change to allow members of the public to join the Club.***" [Emphasis added]. The TRO was granted bestowing judicial imprimatur on the Commissions' position and guaranteed future limitation of use of the Handicap Access assuring prohibition of use, "MR. RAPPOPORT: .

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[3] Quotations are from Transcript of Oral Argument set forth in the Record below. Attorney for State plaintiffs in the State Court enforcement action commenced by Appellant Commission after Appellants' filing and commencement of the instant action, hereinafter "AAG" or "AAG Rappoport".

. . the Salvadors were informed that there were no design criteria that the Commission had for the construction of the ramp. But Mr. White pointed out at the same time ***there were use limitations on the ramp."*** [Emphasis added].

The Commission's intentional prohibition of completion of the Handicap Access prevents the Salvadors' recreational facilities from being ADA compliant accessible to handicapped patrons and employees. The Commission's arguments of fear of possible future increased accessibility by members of handicapped public to the Lake and for limitation of access to the Lake, claimed by the State under its sovereign powers, flies in the face of the laws they, as public servants, are sworn to uphold, protect and defend. Many of the named Respondents have personal vested interests in limiting access to Lake George, as residents of the area or property owners along Lake George. Respondents allowed their stated personal animus for the Salvadors to interfere with their responsibility to the public and their duty to adhere to the law.

D. Respondents Acted to Revoke the Salvadors' Marina Permit Knowingly and in a Conspiratorial Manner Intended to Cause Harm to the Salvadors.

The Commission abetted by Auffredou made a negative determination with respect to the Salvadors' application which had been formally and in writing withdrawn by the Salvadors. The manner in which the Commission proceeded denied the Salvadors' right to a hearing and a full record upon which to base their claim for relief. The Commission reached "findings", as communicated by staff to the Salvadors, which constituted a determination of the Commission. Not only are individual members of the Commission presumed to know and have the duty to know the "rules of the game" in which they participate, determining who shall benefit from favorable decisions and who shall not, but have at their disposal counsel for their meetings, available to them for their deliberations,

and an active participant in the Commission's process their Counsel, Auffredou. The Commission possessed actual knowledge of the implications of their actions, any other conclusion would require their removal for presumptive incompetence.

The Commission exceeded its authority issuing a "declaratory ruling" on its rules and statutes which it deemed applicable and within the scope of its enforcement obligations. The Commission and Auffredou knew or had a duty to know the impact of their action as well as the applicable provisions of the State Administrative Procedures Act, ("SAPA"), on declaratory rulings. Analysis of the concept of declaratory ruling by the Commission was necessary and required. This concept eluded the Commission. Under SAPA § 204, administrative agencies, including the Commission are permitted in certain instances to make, declaratory rulings; however, where the equivalent of a "declaratory judgment" is rendered by the administrative agency, a justiciable controversy exists; judicial review is necessary and proper. The Commission's action on the Salvadors' application establish basis for challenge and established that the property rights, rights to Due Process and other enumerated rights of the Salvadors were and are jeopardized, proving existence of justiciable issues.

Absent proof the Commission and Auffredou were collectively transported into irrationality in a sudden *X Files* moment, it is presumed that these public officials acted in a rational state of mind. A "reasonable" official sitting in the position of Respondents would have known that the actions violated the Salvadors' rights. When the Commission acted on the Salvadors' application adopting Resolution No. 98-69 dated September 29, 1998, it acted despite the fact the application was first withdrawn on April 29, 1998, and subsequently withdrawn in writing to the Commission prior to the date of the Resolution. The Commission in that Resolution acknowledged DEC issued Appellants' facility a marina permit, but found ".

. . the continued operation of the subject facility ***without a Class A marina permit from the Commission*** is a violation of Commission regulations, . . .". [Emphasis added] and ". . . the NYSDEC marina permit for the subject facility was superseded by the enactment of the Commission's regulations applicable to Class A marinas on June 3, 1988, . . ." The Resolution did not attempt to justify the alleged "superseding" of the existing DEC Permit previously granted to the Salvadors in which the Salvadors have a valid property right, nor did it attempt to allege any notice to the Salvadors of the "suspension" of or elimination of their pre-existing rights. The Resolution found the Commission, ". . . acknowledges that the NYSDEC permit may be utilized to establish a baseline level of marina activity offered at the subject facility which would form the basis of a Class A marina permit from the Commission . . .", but failed to admit the Salvadors' existing continuing permit from DEC allowing them to operate as legally authorized permitted and approved by the appropriate permitting entity. The Commission's actions prove full knowledge of their consequences. The Commission and Auffredou also knew or should have known as public servants, that their actions improperly wielding the power of the Commission over the Salvadors would cause the Salvadors actual harm which they suffered and continue to suffer. The Commission and Auffredou knew what they were doing when they proceeded against the Salvadors. Their acts were intentional, with knowledge of their intended results as established by their subsequent argument that the Amended Complaint failed to present a "case or controversy" under Article III of the Constitution. The Commission argued an administrative procedure had not been followed, divesting the Salvadors of standing. The Commission's calculated actions were undertaken in a manner intended to give them this argument if faced with a court challenge and they knew or were advised by Auffredou, that administrative proceedings such as the Commission's, while not required to adhere to all technical requirements of a fair trial, must not violate the fun-

damentals required for fair hearing. The Commission cannot ignore basic principles of Due Process. The Commission knew the Salvadors never waived the right to Due Process or application of SAPA required for the Commission to proceed. The Salvadors "withdrawal"of their application resulted solely from the Commission's illegal, improper acts during the administrative process which established that proceeding would be futile, "exhaustion of administrative remedies" need not be fulfilled where, as here, to proceed further would be futile.

E. Auffredou should be held to a Higher Standard of Conduct than Applicable to Non-Attorney Respondents.

At the Commission's April 29, 1998, public meeting Auffredou strongly recommended that the Commission require that the Salvadors be named personally as "landowners", applicants and be the holders of any Class A Marina Permit issued. Auffredou made this statement with respect to the Salvadors specifically, targeting them for different, harsher treatment than that afforded other applicants before the Commission. The Commission did not impose that requirement other applicants or permittees. Auffredou stated if, ". . . there are problems down the road where the Commission has to get involved with somebody for an enforcement matter or litigated matter, my advice to you is to have the landowner for the purposes of legality, the landowner name has to be included." On the record, one (1) member of the Commission acknowledged the discriminatory treatment of the Salvadors, addressng Auffredou, "Martin, we just issued one to the Flamingo Restaurant on Lake George, and we didn't require George Pestinak's name. Is there any, what's the difference . . . "

Auffredou's actions, motives, and influence as a policy maker, must be scrutinized to make necessary factual determinations. Auffredou, an attorney and officer of the court, is held to a higher standard than other Respondents in determining his level of "knowing" conduct and culpability.

F. The Commission's Actions were Taken with Advice of Available Counsel; the Members Actions Violating the Salvadors' Rights were Knowing and Intentional.

Respondents intentionally acted to deprive the Salvaors of their Constitutional rights while acting under color of law. State versus private action issues impact the level of knowledge and knowledge of the consequences of their acts, required of the Commission as well as the level imputed to them or inferred from their actions. There is no way in the face of the established facts that Respondents' actions could have been committed without both knowledge and the intent. The Commission, its Members and Auffredou conspired to deprive the Salvadors of their Constitutional rights. With the elements of conspiracy are established, the prerequisites of knowledge and intent necessarily flow therefrom. Respondents, acting under color of law and in concert with each other, deprived the Salvadors of their Constitutional rights, including Equal Protection. The record establishes an existing animus and bias against the Salvadors on the part of the Commission and Auffredou. The record also establishes that this targeting of the Salvadors by Respondents was, in part, due to the Salvadors' prior use of *pro se* litigation seeking redress of grievances to the judicial system as they are allowed under the Constitution. The Record establishes prejudice against the Salvadors resulting from their affiliation with other *pro se* litigants with whom the Commission and Rappoport expressed disdain, publically stating those actions should not be allowed.

REASONS FOR GRANTING WRIT

There is no avenue of escape from the paramount authority of the Federal Constitution when there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution. [Emphasis added] *Sterling* v. *Constantin*, 287 U.S. 378, 397-398, 53 S.Ct. 190 (1932).

I. THE ADA MUST APPLY TO STATE AND STATE ACTORS INTENTIONALLY ACTING TO INTERFERE WITH AND TO PREVENT PROVISION OF HANDICAP FACILITIES AND ACCESS BY PRIVATE, NON-GOVERNMENTAL ENTITIES AND PERSONS.

A. The State and State Actors can and have violated the non-interference provisions of the ADA.

Here the governmental actors are guilty of the acts in violation of 42 U.S.C. §§ 122203(a) and (b), including interference, coercion or intimidations "on account of his or her having exercised or enjoyed, or ***on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act***". [Emphasis added]. This is not a conclusory statement. The Commission obtained a TRO (supposed to be temporary). In the argument Rappoport, for the Commission, specifically stated the Commission did not want access to be available to what it averred to be an unidentified number of handicapped persons who might, in the future, use the Handicap Access facility. This is stated on the record; it is not a conjecture, although it contains the Commission's conclusory assertions relating to future use; it is not an argument dreamed up as a result of legal research; rather, it is the Commission's stated position before a court of record. The Commission's fears of possible unfettered access to Lake George by handicapped persons is a fact. While the lower court made much of the fact the Salvadors failed to allege that they currently had handicapped employees and guests or Boat Club members, this is a

factual question which should not have been decided on the pleadings. Even on the pleadings, the Salvadors statements establish the basis for their claim. The Salvadors Affidavits submitted and in the Record clearly establish the marina business is a seasonal business. At specific times the Salvadors have Boat Club members, guest and/or employees who have handicaps. These persons are not at the Salvadors' facilities at all times. They are there at various times during the "season". The Salvadors have very carefully stated in their affidavits what the facts were at the time at which their affidavits were signed. That does not mean that the day or week before or the day or week after such handicapped persons were not present at the facility. Given treatment of the Salvadors by the Commission, these statements were made with extreme and explicit accuracy to avoid any possible misconstruction of the words.

The Department of Justice published proposed rules to amend the regulations in 28 CFR Part 35, 36 and 37, *Federal Register*, June 20, 1994, thereafter adopted, setting standards for "Nondiscrimination on the Basis of Disability in the State and Local Government Services; Public Accommodations and Commercial Facilities; Accessibility Standards" in 28 CFR Part 36, *et seq.* Accessibility standards adopted established only ***minimum*** standards required by law to be met; § 35.152 Alterations: General, expanded the definition of "alteration" adding language mandating compliance in all but the most unusual and effectively prohibitive situations. The Salvadors attempted to comply with accessibility to their recreation facilities, and established that such compliance was not only feasible, but capable of successful implementation without expanding the already existing facilities and through utilization of materials compatible with the existing environment. *Garrett, supra,* cannot and should not be contorted and tortured by semantic games to encourage the perpetuation of barriers to access by the handicapped. The perpetuation of handicapped barriers should not result from a State bureaucracy's application of

stated animus against specific private citizens.

B. The Second Circuit Improperly Affirmed the District Court's Determination that ADA §§ 12203(a) and (b) Do Not and Cannot Apply to States.

The District Court held §§ 12203(a) and (b) "cannot" apply to states on the grounds that to hold otherwise would "abrogate their sovereign immunity". The Court cited *Garrett, supra,* as the foundation for that determination, noting the Salvadors "do not cite any legal authority" for their position. Neither did either lower court cite other authority for their position. The Salvadors cannot cite such legal authority since none exists, and that is one of the Federal issues the Salvadors seek this Court to resolve.

II. THIS COURT'S DECISION IN *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA* v. *GARRETT,* 531 U.S. 356, 121 S. Ct. 955, __ L.Ed. 2d___ (2001) WAS IMPROPERLY APPLIED AND EXTENDED BY THE LOWER COURTS.

A. *Garrett* is Limited to ADA Claims against a State Brought by Employees for Violations of ADA Employment Matter.

Garrett addressed application of the ADA to actions brought by employees against a state as employer. *Garrett's* language did not apply, nor does it logically extend, to a factual scenario which is not predicated upon ADA violations in employment of a plaintiff by a State.

The extension by the lower Courts of the holding in *Garrett, supra,* defeats the legislative purposes of the ADA, circumventing the rationality test required for evaluation of actions under the act and allowing the Commission to escape the consequences of the factually established *ultra vires* actions.

B. The Holding in *Garrett* Must be Interpreted and Applied in Light of the Subsequent Decision in *Palazzolo* v. *Rhode Island* 533 U.S. 606, 121 S.Ct. 2448, _ L.Ed2d _ (2001).

This Court's decision in *Palazzolo* v. *Rhode Island, supra,* reviewing a lower court decision involving violation of the Fifth Amendment Takings Clause applied to States through the Fourteenth Amendment Due Process Clause considered private property rights. In *Palazzolo,* similar to the submission and later withdrawal of the application for a Class A Marina Permit to the Commission, a property owner applied on at least two separate occasions for relief from regulations dealing with protection of coastal wetlands. Similarly to the Salvadors, it was claimed that the private property owner should be denied judicial relief for failure to pursue all possible administrative alternatives conceivably available for relief. This Court noted in *Palazzolo, supra,* under the existing statute and regulations, it was highly unlikely that the private property owner would be successful pursuing administrative remedies no matter how often he applied for such relief. Given the statements made, including Auffredou's, the Salvadors faced the fact that for them too, no matter how often they applied for relief requested, none would be granted.

The statutory scheme in *Palazzolo* is similar to the Commission and its regulations as presented here to be clearly applicable to regulatory conundrum in which the Commission and Auffredou placed the Salvadors. The same type of regulatory machinations existed to thwart the Rhode Island property owner as have been concocted for the operations of the Commission. The impossibility of compliance with regulatory hurdles artificially created by the Commission and additional "special" barriers invented by them for the Salvadors only, by their very nature are so narrow as to target with pinpoint accuracy the Salvadors' marina, creates a regulatory environment in which, regardless of, if or how often the Salvadors applied for and pursued the permit and relief sought, it would be held permanently in the bureaucratic purgatory of the Commission's review and denial process.

Palazzolo, failing to obtain any administrative relief, proceeded to the courts. This Court addressed two key questions, first, ripeness of the controversy for judicial review, and second, the claim of takings with respect to after acquired (post-statutory enactment) property. The issue or ripeness has been a consistent hurdle for the Salvadors. This Court held, "The rulings of the Council interpreting the regulations at issue, the briefs, arguments and candid statements by counsel for both sides, leave no doubt .... Further permit applications were not necessary to establish this point." *Palazzolo, supra.*

This reasoning is precisely applicable here, as does this Courts analysis and holding the, "Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use." *Palazzolo, supra,* at 2460.

> Where the state agency charged with enforcing a challenged land use regulation entertains an application from and owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, . . .,federal ripeness rules do not require the submission of further futile applications with other agencies. *Palazzolo, supra,*[Citation omitted] 2461-2.

This Court evaluated the situation stating:

> The State may not put so potent a Hobbesian stick into the Lockean bundle. . . . . Just as a prospective enactment . . ., can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enact-

> ments are unreasonable and do not become less so through the passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, . . . ,to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. *Palazzolo, supra,* 2462-3.

The argument in *Palazzolo* is just as applicable here. The "crumb" tossed to the Salvadors in the guise of a "permit" bears little resemblance to the DEC Permit under which they have operated and continue to operate. The levels of entitlement and the scope of property rights with respect to their marina permit were established with the issuance of the original DEC permit. Later enacted or adopted regulations otherwise applicable to reduce the scope of the Salvadors' operation, could not be applied without addressing the grandfathered status of the operations which the Salvadors rightly claim under their original and continuing non-revocable DEC permit. To determine otherwise subjects the Salvadors to an *ex post facto* law prohibited by the Constitution.

The Second Circuit hinged its decision with respect to Equal Protection and procedural Due Process upon the withdrawal by the Salvadors of their application from consideration by the Commission, thereby in the Second Circuits' opinion, placing themselves in a unique category with no other applicants being "similarly situated". This reasoning completely ignores *Pallazzo.* The Salvadors first verbally withdrew their application at the Commission's April 29, 1998, meeting, at which Auffredou's statement on the record of discriminatory intent in dealing with the Salvadors' applica-

tion was specifically stated. Attempting to proceed despite Auffredou's statements, the Salvadors consented to further good faith negotiations with the Commission staff and Auffredou. This resulted in further desperate treatment of their application, with the factual established representations made that the Salvadors' matter would not be before the August 19, 1998, Committee, but deferred to the Committee's meeting on September 23, 1998, nor would it be considered by the Commission at its meeting on September 23, 1998, allowing the Salvadors time for submission of further supporting documentation. When the Salvadors' belatedly learned that this was an untrue representation they again withdrew their application from consideration, this time in writing. The Commission refused to honor the withdrawal and issued Resolution 98-69.

The Second Circuit specifically held a permit is not a property right. The Court stated that the Salvadors "concede that they had only a permit". While on its face, the words are correct, taken out of context this incorrectly translates into a purported concession by the Salvadors that they had no property right flowing from their non-revocable DEC Class A Marina Permit, something the Salvadors never conceded. The comparison of the DEC permit to and equating it with a "license" of the type forming the basis of the decision in *New York State Trawlers Association* v. *Jorling*, 16 F.3d 1303 (2d Cir. 1994), on its face is erroneous. The lobster fishing "licenses" considered those as "permits" and involved allowance of a specific activity on other than the lands of licensee in coastal waters. Such "permit"or "license" cannot run with the land, must be specific to the "permittee" or "licensee" and is a regulatory scheme in no way comparable to that engaged in by the Commission. As set forth in specific factual detail in the affidavits submitted by the Salvadors and in the record, the Commission consistently has determined that other Class A Marina Permits (Parillo permits flowing from his predecessor in title, Ellsworth) run with the land and allowed prior Alison

Ellsworth and Robert Ellsworth marina permits to flow to Parillo as successor in title. There can be no doubt that had the Salvadors' submissions below been taken at some value (even not in the light most favorable to the non-moving party), the courts could not find other than these specific permits, Class A Marina Permits issued by the DEC, run with the land and therefore, must constitute at least some form of property right and interest. The Salvadors' marina is uniquely situated, with docks and berths situated on land currently inundated by the flood waters of Lake George, but, as detailed in the Record, legally titled in the Salvadors holding fee title. The treatment of change in permit regulation as similar to that of licensing of lobster fishermen is totally unjustified and unfounded as is the finding that the Salvadors' Class A Marina Permit issued by the DEC "on its face expired on December 31, 1989." The Salvadors respectfully request that this Court arrive at is own conclusion examining the face of the document at issue.

The finding that "no official action has occurred", is erroneous on its face. The Commission adopted Resolution 98-69 , in part effectively "revoking" the Salvadors' existing DEC permit. The Commission sought and obtained a TRO for the Handicap access. It is unclear how it was determined that this means that the Salvadors suffered no "actual or threatened injury." *Brody* v. *Village of Port Chester*, 261 F.3d 288, 290 (2d Cir. 2001). If this does not meet the threshold test of standing, the Salvadors cannot see how a litigant can meet this bar.

The provisions of the ADA must be broadly construed. *Kornblau* v. *Dade County*, (C.A.11, 1996) 86 F.3d 193. Individual defendants properly are named under ADA anti-retaliatory provisions. *Ostrach* v. *Regents of the University of California*, (E.D.Cal. 1997) 957 F.Supp. 196. The individual named Respondents were properly named parties. Dismissal granted by the lower Courts was inappropriate. Issues of fact relating to retaliation under the ADA clearly prohibit such dismissal.

Bowers v. *Bethany Medical Center,* (D.Kan.1997) 959 F.Supp.1385; *Graz* v. *Abbott Laboratories,* (N.D.Ill. 1996) 940 F.Supp. 1227.

III. *ULTRA VIRES* ACTS OF STATE OFFICIALS AND CONTRACTORS ARE NOT PROTECTED BY SOVEREIGN OR QUALIFIED IMMUNITY, IN PARTICULAR WITH RESPECT TO VIOLATION OF THE ADA.

A. The Provisions of the ADA Applicable Here Specifically Provide that Eleventh Amendment Immunity is Not Available to States for Violation of the Act.

The ADA at 42 U.S.C. §12202 addresses the cloak of immunity asserted by the State, "A State ***shall not be immune under the eleventh amendment to the Constitution of the United States*** from an action in Federal or State court of competent jurisdiction for a violation of this Act." Assuming *arguendo* the decision is correct on the status of Respondents, including contractor Auffredou, as state actors, then § 12202 is properly applicable.

The ADA, 42 U.S.C.§§ 12101 *et seq.,* at § 2 sets fourth the purpose for the enactment of the Act:

> (a) (3) discrimination against individuals with disabilities persists in such critical areas as . . . public accommodations, . . .transportation, . . .***recreation,***. . .access to public services; . . . .
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including ***outright intentional exclusion,*** the discrimination effects of architectural, transportation, and communication barriers, over protective rules and policies, ***failure to make modifications to existing facilities and practices,*** exclusionary qualification standards and criteria, ***segregation and relegation to lesser services,*** programs, activities, benefits, jobs, or other opportunities; . . . .[Emphasis added]

The ADA applies to public accommodations and commercial facilities. The term public accommodation is defined in 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(A) to include "an inn, hotel, motel or other place of lodging, . . . " and 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(I) to include "a park, zoo, amusement park, or other place of recreation;" and 42 U.S.C. §§ 12101, *et seq.*, at § 12181(7)(L) to include "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." As part of its role in implementation and enforcement of the provisions of the ADA, the DOJ adopted a Certification procedure under which state and local building codes may obtain Code Certification. In its publication, *Department of Justice, Certification of State and local Building Codes,* www.usdoj.gov/crt/ada/certcode.htm, the DOJ states specifics relating to both new construction and alterations to existing structures. As established in writing by Respondent White on behalf of the Commission, the Commission had no standards for construction of such Handicap facilities, only with respect to the limitation of use of such facilities. This document substantiates the Salvadors' allegations. Whether or not DOJ regulations and Technical Assistance Manual should be considered in determining whether or not a municipality's decisions when reviewed under the ADA previously was considered by the Second Circuit in *Innovative Health Systems, Inc.* v. *City of White Plains,* (2d Cir. 1997) 117 F.3d 37. The Court considered those factors in making its decision, and that the consideration reinforced the plain meaning of the ADA, did not contradicted its intent. Regulations promulgated under the ADA are entitled to the presumption of validity. *Ferguson* v. *City of Phoenix,* (D.Ariz. 1996) 931 F.Supp. 688; *Paralyzed Veterans of America* v. *D.C. Arena L.P.,* (C.A.D.C. 1997) 117 F.3d 579, 326 U.S.App.D.C. 25 . Those regulations are entitled to the equivalent of legislative weight, controlling weight when evaluated by the Courts. *Helen L.* v. *DiDario* ,(3rd Cir.1995) 46 F.3D 325, rehearing and rehearing in banc denied, cert. denied 116 S.Ct. 64, 133 L.Ed.2d 26; *Yeskey* v.

Commissioner of Pennsylvania Dept. of Corrections, (3rd Cir. 1997) 118 F.3d 168; *Does 1-5* v. *Chandler,* (9th Cir.1996) 83 F.3d 1150.

Respondents argued a position in direct contradiction to DOJ's publically enunciated position. In May 2000, in *A Guide to Disability Rights,* DOJ Civil Rights Division, Disability Rights Section, addresses requirements for compliance under Title III for Public Accommodations, stating, "Public accommodations are private entities who own, lease to, or operate facilities such as. . . hotels, . . .and recreation facilities, ..." *A Guide to Disability Rights,* p 6. When the Salvadors' facilities required repair work and area renovations, as part of their work plan they determined they needed to effectuate any "achievable barrier removal" to provide the requisite Handicap access to their recreational facilities. Access to water for recreational use enjoyment by guests and members, and their employees, required crossing an unimproved sandy area, creating a barrier to access for handicapped persons, especially using wheelchairs or crutches for mobility. The Salvadors sought and obtained all necessary and existing governmental approvals for the project. ADA is not limited to actual physical structures with definite physical boundaries, but includes areas of open air access encompassing precisely the Salvadors' Handicap Access. *Shultz By and Through Shultz* v. *Hemet Youth Pony League, Inc.* (C.D.Cal. 1996) 943 F. Supp. 1222.

The ADA applies to all aspects of state and local government function and governance, including Respondents' actions. *Saunders* v. *Horn,* (E.D.Pa. 1996) 959 F.Supp. 689. Respondents cannot evade ADA provisions by claiming lack of employer-employee relationship. Applicable ADA provisions do not required such relationship. *Judice* v. *Hospital Services District No. 1,* (E.D.La. 1996) 919 F. Supp. 978. Individuals are liable under the ADA for their own discriminatory acts. Respondents have the authority and discretion to make decisions which result in discriminatory treatment of those protected

under the ADA, including the Salvadors, leading to the inevitable conclusion that Respondents as individuals can be held personally liable for their own discriminatory acts. *Howe* v. *Hull,* (N.D.Ohio 1994) 874 F.Supp 779. As held in *Innovative Health Systems, Inc.* v. *City of White Plains,* (S.D.N.Y. 1996) 931 F.Supp.222, aff'd in part 117 F.3d 37 (2d Cir.1997), the question whether the proposed imposition of governmental regulations is a violation is a question of fact which cannot be resolved on a motion to dismiss. The provisions of the ADA are an inherent part of the Amended Complaint. The facial statutory language and judicial determination that Congress lawfully enacted the ADA pursuant to its authority under the Fourteenth Amendment, the ADA by its terms does not bar suits under the ADA against states in Federal Court. *Williams* v. *Ohio Department of Mental Health,* (S.D.Ohio 1997) 960 F.Supp. 1276; *Crawford* v. *Indiana Department of Corrections,* (N.D.Ind. 1996) 937 F.Supp. 785, reve'd 115 F.3d 481. Abrogation of states' Eleventh Amendment immunity under the ADA precludes assertion of that defense by state officials sued in their official capacity. *Duffy* v. *Riverhead,* (9th Cir. 1996) 98 F.3d 447. *Kilcullen* v. *New York State Department of Labor,* (2d Cir. 2000) 205 F.3d 77, held Congress validly abrogated the State's Eleventh Amendment immunity under the ADA through a valid exercise of its Fourteenth Amendment enforcement powers. *Muller* v. *Costello,* (2d Cir. 1999) 187 F.3d 77. As detailed above, this is in no way limited by the decision in *Garrett, supra.*

The Eleventh Amendment does not provide an absolute shield to defendants who act in violation of Constitutional rights. *Biggs* v. *Best, Best & Krieger,* (9th Cir. 1999) 189 F.3d 989. Respondents' conduct falls squarely within that intended and statutorily identified as constitutionally protected. *Gilbrook* v. *City of Westminster,* (9th Cir., May 21, 1999) 96-56306, 96-56375, 97-55314, 1999 WL 496486; *Anderson* v. *Creighton,* 486 U.S. 635 (1987). Eleventh Amendment immunity does not extend to protect conduct violating "'. . .clearly established statutory or

constitutional rights of which a reasonable person would have known.'" *Brewster* v. *Board of Education,* (9th Cir 1998) 149 F.3d 971, 977 quoting *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982). Intentional acts of public officials knowingly violating Constitutional rights of others are not entitled to immunity. *Malley* v. *Briggs,* 475 U.S.335(1986).

The Eleventh Amendment "provides no immunity for state officials sued in their personal capacities." *Dube* v. *State University of New York,* 900 F.2d 587,595 (2d Cir. 1990); *Quartro* v. *Catterson,* 1996 WL 34120, *8, __ F.Supp. __ (1996). "[T]he Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *Brody* v. *Leamy,* 393 N.Y.S.2d 243,259 (N.Y.Sup. 1977) quoting *Scheuer* v. *Rhodes,* 416 U.S. 232,237, 94 S.Ct. 1683,1687 (1974). Such acts cannot be authorized in the performance of their official duties. *Pennhurst State School & Hospital* v. *Haldeman,* 465 U.S. 89,102, 104 S.Ct 900,909 (1984); *Berman Enters, Inc.* v. *Jording,* 3 F.3d. 602, 606 (2d Cir. 1993); *Rourke* v. *N.Y. State Dept. of Correct. Services,* 915 F.Supp. 525,539 (N.D.N.Y. 1995); *Farid* v. *Smith,* 850 F.2d 917,921 (2d Cir. 1988).

B. The Extension of Eleventh Amendment Immunity to Contractors Doing Business with the State or State Entities is Unauthorized and Unwarranted.

The extension by the Second Circuit of Eleventh Amendment immunity to contracting entities establishes a new precedent which far exceeds the prior scope of such immunity. Extension of this protection to non-governmental persons and entities merely because they hold a government contract is an open invitation to improper assertion of governmental "privileged" status. Not only are there no cases cited by the lower Court which actually support this position, the court did not provide any citation which the Salvadors can address in this argument.

The Salvadors sued under the provisions of the ADA. That statute allows injunctive relief and monetary recovery. 28 C.F.R. Part 36, §§ 501, *et seq.* and 505. The Salvadors sued individual Respondents in their official capacity for prospective injunctive relief to prevent the deprivation of Constitutional rights on the basis of violations of Federal Constitutionally protected rights. *Dube, supra,* at 595. The fact that the Salvadors also seek monetary damages is not barred by the Eleventh Amendment to the extent asserted against Respondents in their personal capacities.

IV. THE FIRST AMENDMENT PROTECTS INDIVIDUALS FROM INTERFERENCE WITH EXERCISE OF CITIZENS SEEKING REDRESS THROUGH COURT PROCEEDINGS.

A. The Right to Seek Relief Through Judicial Proceedings is an Inherent Part of Our System of Government and is Essential to Public Confidence in the System.

"[T]he rights to complain to public officials and to seek administrative and judicial relief [are] protected by the First Amendment." *Franco* v. *Kelly,* 854 F.2d 584, 589 (2d.Cir 1988); *Gagliardi* v. *Village of Pawling,* 18 F.3d 188,194 (2d.Cir.1994).

B. The Explicit Provisions of the ADA Precluding Gant of Immunity to the Commission and Auffrdou Establish the Disparate Treatment of the Salvadors on Issues of Handicap Access.

ADA Accessibility Standards in 28 C.F.R. Part 36, Appendix A are applicable since the Salvadors' facilities fell within the meaning of public accommodation under 42 U.S.C. § 12181(7)(A) and 28 C.F.R. § 36.104. The Commission's acts prohibiting completion and use of the Handicap Access is a defined violation of the ADA. The Commission directly interfered with the Salvadors' efforts to allow Handicap individuals' exercise and enjoyment of their protected rights. The conduct of the Commission restricts access and use of Lake George to existing property owners or those granted

access by the Commission.

The Commission and Auffredou, acted based on the Salvadors' prior exercise of their right to access to the Courts. The Commission argued that since the Salvadors were and are parties to other litigation, some involving the Commission, their application was properly treated differently. The Commission asserted the Salvador's prior access to the judicial system, in particular in *pro se* status, render any litigation brought by them frivolous and unentitled to any hearing.

C. The Salvadors' Marina Business is Engaged in Interstate Commerce Requiring Compliance with the ADA which the Commission Improperly Prevents.

The Salvadors' marina business is engaged in interstate commerce as established in the Record. 15 U.S.C. § 1, does not proscribe independent action on the grounds established in the Salvadors' pleadings. *Bogan* v. *Northwestern Mutual Life Insurance Company,* (S.D.N.Y. 1997) 953 F.Supp. 532. All elements required to support their allegations and detailed the Act specifically allowing action against governmental entities such as the Commission where their conduct violates these provisions. *Town of Hallie* v. *City of Eau Claire,*105 S.Ct.1713, 471 U.S. 34, 85 L.Ed.2d 24 (1985); *Airline Car Rental, Inc.* v. *Shreveport Airport Authority,* (W.D.La. 1986) 667 F.Supp. 293; *Jackson* v. *West Indian Co., Ltd.,* (D.Virgin Islands 1996) 944 F.Supp. 423. Under the 15 U.S.C. § 2, the Salvadors are proper parties to an action to prohibit monopolizing trade. *United States* v. *Aluminum Co. of America,* (2d Cir. 1945) 148 F.2d 416. Business interests are either held directly or indirectly by Respondents, but the full extent cannot be determined without discovery. The statute ***requires*** discovery to obtain documents exclusively in Commission and Individual Respondents' possession relating to competing business interests held by one or more individuals named who acted in decision making capacity and interfered with the Salvadors' business in interstate commerce.

Northern Securities Co. v. *U.S.*,24 S.Ct.436,193 U.S.197(1904). See also *Atlantic Motel* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294,; *Maryland* v. *Wirtz*, 392 U.S. 183, 193.

The Commission created a sub-class of land owner-marina operator, including only the Salvadors, who the Commission, by virtue of its unfettered regulatory powers, denied the ability to engage in commercial ventures involved in interstate commerce and at the same time prevent from meeting the requirements of the ADA. The Commission allowed other similarly situated land owner-marina operators to develop commercial (and interstate) uses of their property. The methodology and application of these regulatory powers by the Commission as wielded against the Salvadors, as opposed to other land owners-marina operators in the same area, including those who have made no attempt to comply with the ADA, results in unconstitutional interference with and imposition of impermissible burden on interstate commerce and a clear denial of equal protection through its discriminatory regulation application.

CONCLUSION

THEREFORE, Petitioners John Salvador, Jr. and Kathleen A. Salvador request this Court that it **GRANT** the Petition for a Writ of Certiorari to the United Sates Court of Appeals for the Second Circuit.

Respectfully submitted,

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